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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1949

No. 154

WONG YANG SUNG,

Petitioner,

vs.

TOM C. CLARK, ATTORNEY GENERAL OF THE UNITED STATES, AND WATSON B. MILLER, UNITED STATES COMMISSIONER OF IMMIGRATION AND NATURALIZATION

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT FOR THE DISTRICT OF COLUMBIA CIRCUIT AND BRIEF IN SUPPORT.

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The Petitioner, Wong Yang Sung, by his attorneys, prays that a writ of certiorari issue to review the judgment of the Court of Appeals for the District of Columbia Circuit (R. 9) affirming an order of the District Court for the District of Columbia (R. 7) discharging the writ of habeas corpus herein.

Opinions Below

The Court of Appeals affirmed the order in a per curiam opinion (R. 8). The opinion of the District Court is reported at 80 F. Supp. 235.

Jurisdiction

The judgment of the Court of Appeals was entered on April 4, 1949. The jurisdiction of this Court is invoked under 28 U. S. C. 1254 (1).

Questions Presented

1. Whether the hearing accorded an alien in a deportation case is a hearing "required by statute" and as such subject to the provisions of the Administrative Procedure Act (5 U. S. C. 1004-c) which require that hearing officers shall not be subject to the supervision of officials engaged in investigative or prosecuting functions.

2. Whether hearing officers in deportation proceedings are required to be appointed pursuant to the Administrative Procedure Act (5 U. S. C. 1010) and assigned to hearings in rotation.

3. Whether deportation proceedings are exempt from the terms of the Administrative Procedure Act by reason of the fact that they are "specified classes of proceedings . . . before . . . officers specially provided for by or designated pursuant to statute." (5. U. S. C. 1006).

Statutes Involved

Section 16 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 885, 8 U. S. C. 152 provides:

> ". . . The inspection . . . of aliens, including those seeking admission or readmission to or the privilege of passing through or residing in the United

States, and the examination of aliens arrested within the United States under this section, shall be conducted by immigrant inspectors, except as hereinafter provided in regard to boards of special inquiry. . . . Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter, pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence."

Section 19 of the Immigration Act of February 5, 1917, as amended, 39 Stat. 889, 8 U. S. C. 155 provides:

"At any time within five years after entry, any alien who at the time of entry was a member of one or more of the classes excluded by law; any alien who shall have entered or who shall be found in the United States in violation of this chapter . . . shall, upon the warrant of the Attorney General, be taken into custody and deported. . . . In every case where any person is ordered deported from the United States under the provisions of this chapter, or of any law or treaty, the decision of the Attorney General shall be final."

Section 5 of the Administrative Procedure Act of June 11, 1946 (5 U. S. C. 1004) provides:

In every case of adjudication required by statute to be determined on the record after opportunity for an agency hearing, . . .

(c) *Authority and function of officers and employees.* The same officers who preside at the reception of evidence . . . shall make the recommended or intial decision . . . Save to the extent required for the disposition of ex parte matters as authorized by law, no such officer shall consult any person or party or any fact in issue unless upon notice and opportunity for all parties to participate; nor shall such officer be responsible to or subject to the supervision or direction of any

officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency. No officer, employee, or agent engaged in the performance of investigative or prosecuting functions for any agency in any case shall, in that or a factually related case, participate or advise in the decision, recommended decision, or agency review pursuant to section 1007 of this title except as witness or counsel in public proceedings."

Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) provides:

"In hearings which section 1003 or 1004 of this title requires to be conducted pursuant to this section——

(a) There shall preside at the taking of evidence (1) the agency, (2) one or more members of the body which comprises the agency, or (3) one or more examiners appointed as provided in this chapter; but nothing in this chapter shall be deemed to supersede the conduct of specified classes of proceedings in whole or part by or before boards or other officers specially provided for by or designated pursuant to statute."

Section 11 of the Administrative Procedure Act (5 U. S. C. 1010) provides:

"Subject to the civil-service and other laws to the extent not inconsistent with this chapter, there shall be appointed by and for each agency as many qualified and competent examiners as may be necessary for proceedings pursuant to sections 1006 and 1007 of this title, who shall be assigned to cases in rotation so far as practicable and shall perform no duties inconsistent with their duties and responsibilities as examiners. Examiners shall be removable by the agency in which they are employed only for good cause established and determined by the Civil Service Commission (hereinafter called the Commission) after opportunity for hearing and upon the record thereof. Examiners shall receive compensation prescribed by the Commission

independently of agency recommendations or ratings and in accordance with sections 661-663, 664-669, 670-782, 673, and 674 of this title, except that the provisions of paragraphs (2) and (3) of subsection (b) of section 667 of this title, and the provisions of section 669 of this title, shall not be applicable."

Statement

Petitioner is a citizen of China who has resided in the United States since his arrival on April 21, 1946. He was arrested in deportation proceedings on October 14, 1947 on a warrant issued the preceding day. After hearings on December 11, 1947 and January 29, 1948, his deportation was directed on the charge that he remained in the United States after legal admission for a period longer than permitted under the Immigration Laws (8 U. S. C. 214; 8 C. F. R. 120.37). An appeal from the order of deportation was dismissed by the Board of Immigration Appeals on June 4, 1948.

The petition for *habeas corpus* filed on July 23, 1948, alleged that the hearing was not conducted in conformity with the Administrative Procedure Act, 5 U. S. C. 1004, 1010. On July 29, 1948 District Judge Alexander Holtzoff discharged the writ on the ground that deportation hearings were exempt from the Administrative Procedure Act under 5 U. S. C. 1006(a). On April 4, 1949 the United States Court of Appeals for the District of Columbia affirmed by *per curiam* opinion.

Reasons for Granting the Writ

This writ of certiorari is sought because the issues presented herein raise an important question of federal law that has not been but should be settled by the Supreme Court, *i. e.* whether the deportation process is subject to the Administrative Procedure Act.

Whether immigration proceedings involving the admission of aliens are subject to the Administrative Procedure Act was raised but left undecided by the Supreme Court in *Johnson* v. *Shaughnessy*, 93 Law Ed. 849 (October, 1948, Term).

During the 80th Congress the Immigration Service actively sought the enactment of a bill to specifically exempt it from the application of the Administrative Procedure Act (H. R. 6652 and S. 2755). Congress declined to approve this legislation. A bill is now pending in the 81st Congress to accomplish the same end (Section 5 of H. R. 10). It thus appears that the Department of Justice recognizes that the legal issue presented is not only controversial but that its position is sufficiently doubtful to require the aid of a specific legislative exemption from the application of the Administrative Procedure Act.

It is therefore respectfully submitted that the controversy attendant upon the construction of the Administrative Procedure Act should be settled by the Supreme Court. The instant case was the first to consider the deportation process exempt from the Administrative Procedure Act under the provisions of 5 U. S. C. 1006. It has become the leading case on the subject. The ruling herein merits review by the Supreme Court to settle important issues of federal law which will affect the conduct of thousands of deportation hearings.[1]

Argument

Petitioner contends that the deportation proceeding herein was unfair because it violated Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) which requires separation of functions and independent

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[1] The Immigration Service estimates that there are an average of 18,000 deportations annually.

hearing examiners. The Deportation Process is within the Administrative Procedure Act because:

I. Deportation hearings are required by statute.

II. Section 7 of the Administrative Procedure Act (5 U. S. C. 1006) which exempts special classes of hearings before officers designated by statute does not exempt deportation hearings.

(a) Section 16 of the Immigration Act of 1917 (8 U. S. C. 152) does not relate to the *conduct* of deportation hearings but merely to the *inspection* of aliens and the authority of immigrant inspectors.

(b) Immigrant inspectors do not possess the qualifications contemplated by 5 U. S. C. 1006.

I

The Deportation Hearing Herein Was Unfair and in Violation of the Administrative Procedure Act

If deportation proceedings are required to be held pursuant to statute, then they are subject to the Administrative Procedure Act and the instant hearing was unfair because it was conducted in violation of its provisions.

Section 5 of the Administrative Procedure Act requires hearing officers to be detached from investigative and prosecuting functions. "The separation of functions must be reflected in the rules of organization and procedure published pursuant to section 3(a)" of the Administrative Procedure Act. (P. 262 Legislative History of the Administrative Procedure Act, Senate Document 248, 79th Congress).

There is no dispute that the Immigration Service failed to comply with this mandate of the Administrative Procedure Act.

S. 675, 77th Congress, 1st Session, was one of the bills which preceded S. 7 which became the Administrative Pro-

cedure Act. Section 301 of S. 675 applied to proceedings where "legal relations are required by law to be determined after opportunity for hearing."

Major Schofield, head of the Immigration Service, testified on April 30, 1941 before a Senate Judiciary Sub-Committee as follows with reference to S. 675:

> "Through section 301, it applies its hearing-commissioner system only to cases where by law formal procedures are now required. In other words, as we read it, its requirements apply only to deportation and exclusion cases . . . We think that the hearing-commissioner system would improve our present procedures to a considerable extent without stultifying the administration of the laws. . . . Now we use inspectors to hear cases who are engaged in other activities when not acting as presiding officers. Both S. 675 and S. 674 would prevent this and would require a staff of hearing commissioners devoted solely to hearing and deciding cases." (pp. 571, 575, Hearings on S. 674, 675, 918, 77th Cong. 1st Sess.)

It is equally clear that the Immigration Service has not selected its presiding officers in conformity with Section 11 of the Administrative Procedure Act.

When the application of the Administrative Procedure Act to deportation proceedings was first discussed by the Immigration Service and the Department of Justice, it was concluded by the Service and the Department that *exclusion proceedings* did not fall within section 5(c) because the *admission procedure* was an initial application for a license. Examiners were not appointed pursuant to section 11 of the Administrative Procedure Act because Section 7(a) exempted statutory hearings and Section 17 of the Immigration Act of 1917 prescribed the qualifications and manner of appointment of officers and regulated the conduct of such

hearings. (*House Report 2140, 80th Congress 2nd Sess.*, pp. 4-5).

On the ground that the deportation statute (Section 19 of the Immigration Act of 1917) "does not require an adjudication 'to be determined on the record after opportunity for an agency hearing' it was concluded by the Immigration and Naturalization Service, with the approval of the Department of Justice, that the adjudication requirements of the Administrative Procedure Act were not intended by Congress to apply to the immigration statutes providing for deportation of aliens unlawfully in the United States" (*House Report 2140, 80th Congress*, 2d Session).

Former Immigration Commissioner Carusi, frankly admitted the non-compliance of the Service with the provisions of the Administrative Procedure Act, stating:

> "If the Administrative Procedure Act purported to govern 'hearings required by law', we would consider ourselves bound by its provisions. It is highly significant that such language was . . . modified in the final draft so as to refer only to hearings 'required by statute'" (*The Federal Administrative Procedure Act and the Immigration and Naturalization Service* by Commissioner Carusi, February 1947 Monthly Review, Immigration Service at p. 103).

In testimony before the Senate Subcommittee on Immigration on S. 2755, 80th Congress, on June 9, 1948, the General Counsel of the Immigration Service, the Assistant Commissioner of Immigration Service and the Attorney General's office urged the enactment of a bill to exempt the Immigration Services from the provisions of the Administrative Procedure Act. These witnesses explained that deportation hearings were not being conformed to the Administrative Procedure Act because the hearing was one required by law and not by statute. (Pp. 4-6, 11-12, 21-22 of

Testimony on file with Senate Immigration Subcommittee.) David Reich, representing the Attorney General, stated as follows (at p. 12):

> "In deportation proceedings, as has been stated by Mr. Savoretti (Assistant Commissioner of Immigration) and Mr. Winings (General Counsel), there is no requirement by statute for a hearing."

This was the contemporaneous administrative construction given to the Administrative Procedure Act by the Attorney General and the Immigration Service.

Nevertheless in the instant case the government urged and District Judge Holtzoff found that deportation was a proceeding before an officer "specially provided for or designated pursuant to statute." This ruling could only be reached on the assumption that deportation hearings were statutory—otherwise the exemption of 5 U. S. C. 1006 would be inapplicable. (The correctness of this ruling will be discussed more fully in Point II.) In its brief in the Court of Appeals (p. 7) the government declared:

> "It is plain from the wording of the statute itself (8 U. S. C. 152) that the examination and *hearing* granted aliens arrested under the Immigration Act shall *by virtue of the express provisions of the Immigration Act* be conducted by immigrant inspectors."

At the same time, the Government also contended that the requirement of a hearing in deportation "is one which has evolved by judicial decision applying customary concepts of due process. Thus, the hearing is one 'required by law' rather than one 'required by statute'" (p. 13, Brief in Court of Appeals).

It is the contention of petitioner that deportation hearings are subject to Sections 5 and 11 of the Administrative Procedure Act (5 U. S. C. 1004, 1010) because the hearings are required by statute as the term is used in that Act. The

Supreme Court has held that the immigration statutes are to be construed to require a hearing on the record to adjudicate whether an alien is deportable.

Japanese Immigrant Case, 189 U. S. 86;
Kwock Jan Fat v. *White*, 253 U. S. 454;
Bridges v. *Wixon*, 326 U. S. 135.

This construction of the statute follows both the requirement of due process and the *Congressional intent*. In the *Japanese Immigrant* case, *supra*, at 100, 101, the court said:

> "But this court has never held, nor must we now be understood as holding, that administrative officers, when executing the provisions of a statute involving the liberty of persons, may disregard the fundamental principles that inhere in 'due process of law' as understood at the time of the adoption of the Constitution. . . . Therefore, it is not competent for the Secretary of the Treasury or any executive officer, at any time within the year limited by the statute, arbitrarily to cause an alien who has entered the country, and has become subject in all respects to its jurisdiction, and a part of its population, although alleged to be illegally here, to be taken into custody and deported without giving him all opportunity to be heard upon the questions involving his right to be and remain in the United States. No such arbitrary power can exist where the principles involved in due process of law are recognized.
>
> "*This is the reasonable construction of the acts of Congress here in question.* . . . In the case of all acts of Congress, such interpretation ought to be adopted as, without doing violence to the import of the words used, will bring them into harmony with the Constitution." (Italics supplied.)

In *Bridges* v. *Wixon*, *supra*, the court stated:

> "As construed and applied in this case, *the statute calls* for the deportation of Harry Bridges after a fair hearing" (at p. 160).

In *American Power Co.* v. *S. E. C.*, 329 U. S. 90, the Supreme Court stated with reference to the Public Utility Holding Company Act:

> "That the statute does not expressly insist upon what in fact has been given the security holders is without constitutional relevance under the circumstances. Wherever possible, statutes must be interpreted in accordance with constitutional principles. Here, in the absence of definite contrary indications, it is fair to assume that Congress desired sec. 11(b)(2) be lawfully executed by giving appropriate notice and opportunity for hearing to all those constitutionally entitled thereto. See the Japanese Immigrant Case, 189 U. S. 86, 100-101 (at p. 108)".

In *Eisler* v. *Clark*, 77 F. Supp. 610, Judge Goldsborough held that Section 11 of the Administrative Procedure Act applied to deportation, stating:

> "The courts have read due process into the Act, and due process means a hearing, and . . . therefore hearing is an integral part of *the Deportation Act;* in fact, just as much as if the Act itself in words stated that a hearing should be held."
>
> Accord: 49 Columbia Law Review 73.

It should also be noted that Section 20 of the Immigration Act of February 5, 1917 (39 Stat. 890-891; 57 Stat. 511; 8 U.S.C. 156) specifically recognizes that hearings are required in deportation cases. It provides for the release of an alien on bond conditioned that "such alien shall be produced when required for a hearing or hearings in regard to the charge upon which he has been taken into custody." Indeed, if the deportation statutes did not require a hearing they would be unconstitutional. *Japanese Immigrant* case, *supra.* It would seem strange that Congress should require the application of the Administrative Procedure Act to cases where a statute *in haec verba* required a hearing

but not to cases where constitutional interpretation of the statute requires a hearing. Respect for the law does not thrive upon such capricious interpretations. *Delgadillo* v. *Carmichael*, 323 U. S. 388, 391.

The word "statute" when used in a federal enactment includes "Constitution."

A.F.L. v. *Watson*, 327 U. S. 582;
Phillips v. *U. S.*, 312 U. S. 246;
Hamilton v. *University of California*, 293 U. S. 245;
King Mfg. Co. v. *Augusta*, 277 U. S. 100, 103.

The legislative history of the Administrative Procedure Act confirms the fact that Congress intended to cover deportation hearings, i. e., where such hearings were required by statute although not required by the express terms of the statute.

Senate Document No. 248, 79th Congress, 1st Session, states with reference to section 5 at page 22:

> "Limiting application of the sections to those cases in which statutes require a hearing is particularly significant, because thereby are excluded the great mass of administrative routine as well as pensions, claims, and a variety of similar matters in which Congress has usually intentionally or traditionally refrained from requiring an administrative hearing."

It is clear from the above that Congress intended merely to exclude those cases where a hearing was granted as a matter of grace.

This is reinforced by Senate Document No. 248, 79th Congress at page 285, note 9, which states:

> "A statute may, in terms, require a rule or order to be made upon the record of a hearing, or in the usual case be interpreted as manifesting a Congressional intention so to require, and in either situation Sections 7 and 8 (of the Administrative Procedure Act) would apply save as other sections are operative."

By this language it appears clear that Congress not only included hearings required by statute *in haec verba* but also where hearings were required as a matter of statutory construction. It would therefore appear to be plain that deportation hearings are under the Administrative Procedure Act and particularly within sections 5 and 11.

II

Section 7 of the Administrative Procedure Act Does Not Exempt Deportation Proceedings

Judge Holtzoff in the instant case (80 F. Supp. 235) and the Second Circuit in *Azzollini* v. *Watkins*, 172 F. 2(d) 897 (C.C.A. 2, 1948), have held that by reason of Section 16 of the Immigration Act of 191[illegible] (8 U.S.C. 152), deportation hearings are conducted by officers designated by statute and that the deportation process is accordingly exempt from the Administrative Procedure Act. The complaint in the *Azzollini* case did not state a cause of action (81 F. Supp. 187) and the plaintiffs therein were subsequently relieved of the deportation orders by direction of the Board of Immigration Appeals on June 14, 1949. There was thus no opportunity or need to apply for certiorari in that case. Reference to the records and briefs in both cases will disclose that the deportation process was not fully explained to or understood by Judge Holtzoff [2] or the Second Circuit.

The initial step in a deportation case is the investigation of an alien by an immigrant inspector. This is followed by the issuance of a warrant of arrest and the formal deportation hearing.

8 C.F.R. 150.1, 150.3, 150.4a;

Steinberg, The Warrant Hearing in a Deportation Proceeding, Federal Bar Assn. Journal, July, 1945.

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[2] See: Criticism of decision by Gerard Reilly in *Sunday Star*, August 8, 1948.

Detailed provisions for the conduct of a deportation hearing are contained in 8 C.F.R. 150.6 and the presiding officer at the hearing may not be the same immigrant inspector who conducted the investigation (8 C.F.R. 150.6(b)).

Section 16 of the Immigration Act of 1917 (8 U.S.C. 152) does not provide for the *procedure* at the *formal deportation hearing*. Assuming that it applies to deportation at all, it merely grants authority to immigrant inspectors to *investigate* or *inspect*.

Section 16 of the Immigration Act of 1917 provides:

> "The inspection, other than the physical and mental examination, of aliens, including those *seeking* admission or readmission to or the privilege of passing through or residing in the United States, and the examination of aliens arrested within the United States *under this section*, shall be conducted by immigrant inspectors . . . . All aliens *arriving* at ports of the United States shall be examined by at least two immigrant inspectors . . . . Immigrant inspectors are hereby authorized and empowered to board and search for aliens any vessel, railway car, or any other conveyance, or vehicle in which they believe aliens are being brought into the United States. *Said inspectors shall have the power to administer oaths and to take and consider evidence touching the right of any alien to enter, reenter,* pass through, or reside in the United States, and, where such action may be necessary, to make a written record of such evidence; . . . All aliens *coming to* the United States shall be required to state under oath the purposes for which they come, the length of time they intend to remain in the United States, whether or not they intend to abide in the United States permanently and become citizens thereof, and such other items of information regarding themselves as will aid the immigration officials in determining whether they belong to any of the excluded classes . . . Every alien who may not appear to the examining immigrant inspector *at the port of arrival* to be

> clearly and beyond a doubt entitled to land shall be detained for examination in relation thereto by a board of special inquiry . . . The decision of an immigrant inspector, if favorable to the admission of any alien, shall be subject to challenge by any other immigrant inspector . . ." (Italics supplied).

It is doubtful that this section was intended to apply to any phase of the deportation process. *Contra, Graham* v. *U. S.*, 99 F. 2(d) 746. The section covers exclusion proceedings. The jurisdiction of immigrant inspectors and this section is defined in the first sentence to cover aliens seeking admission for temporary purposes or for residence.

Indeed, the section expressly provides that if the evidence thus developed does not establish beyond doubt the right of the alien to land, the alien shall be detained for examination before a Board of Special Inquiry. The conduct of the examination hearing before such Board is prescribed in detail in Section 17 of the Immigration Act of 1917.

In any event, assuming that the section covers the deportation process, it relates solely to the authority of inspectors to investigate or to take a preliminary statement in the initial informal state of the deportation process (8 C. F. R. 150.1 (a-c)).

In the *Report of the Secretary of Labor's Committee on Administrative Procedure* (The Immigration and Naturalization Service) by Marshall Dimock, Henry Hart and John McIntire (1940) at page 66 it is concluded:

> "*Basis of inquisitorial power*—Sweeping authority to question suspected aliens, *independently of any formal proceedings* against them, is conferred upon immigrant inspectors by Section 16 of the Act of 1917 . . . In the unsatisfactory fashion characteristic of the immigration statutes, however, this authorization appears in the middle of a long paragraph dealing primarily with procedure at the border, and some doubt

may exist as to whether it refers to *inquiries* concerning the rights of other than entering aliens. The Department, however, has taken the view that it does, and we are satisfied that such a view is correct." (Italics supplied.)

Section 16 of the Immigration Act of 1917 refers to the "inspection of aliens, the power of inspectors to administer oaths", "to take and consider evidence", "to make a written record of such evidence where necessary and to investigations . . . . conducted by an immigrant inspector." Not a word is said about the conduct of deportation hearings as in the case of exclusion "hearings" before Boards of Special Inquiry (39 Stat. 887; 8 U. S. C. 153). The taking of evidence in the form of a preliminary statement from the alien (8 C. F. R. 150.1) is obviously not a provision for the conduct of a formal deportation hearing. (8 C. F. R. 150.6)

It seems clear that the Attorney General and the Immigration and Naturalization Service have never regarded this section as one relating to formal deportation proceedings. In promulgating regulations concerning the arrest, deportation and conduct of hearings thereon (Part 150, Title 8, Code of Federal Regulations), the Attorney General does not cite Section 16 of the Immigration Act of 1917 as forming the statutory basis or authority for the regulations (see Note following 8 C. F. R. 150.1(f)). On the other hand, regulations concerning the inspection and investigation of *arriving* aliens all refer to Sec. 16 of the Immigration Act of 1917 as statutory authority for their issuance. (See, e. g., 8 C. F. R. 110.7 to 110.11, 110.41, 110.46, 110.49, 110.50; 8 C. F. R. 12.2; 8 C. F. R. 118.6; 8 C. F. R. 120.22 to 120.24; 8 C. F. R. 130.4, 130.6, 130.8; 8 C. F. R. 140.1)

The conclusion of the Secretary of Labor's Committee that 8 U. S. C. 152 refers to the informal preliminary state

of the deportation process is therefore well taken. This section thus cannot be made the basis for an exemption under 5 U. S. C. 1006. Section 16 (8 U. S. C. 152) does not provide for the conduct of a formal deportation hearing before an immigrant inspector and it has not heretofore been so interpreted by the Immigration Service.

Furthermore, it will be observed that the exemption of Section 7 of the Administrative Procedure Act, 5 U.S.C. 1006 "does not mean that agencies are authorized—whether pursuant to the express authority of other statutes or not—to avoid the examiner system—set up in this bill . . . by assigning general employees or attorneys to hear cases individually or as boards. In short, unless the agency or its members or *some specially qualified statutory officer* hears the case, an examiner qualified under section 11 of this bill must do so." (Congressman Walter, Senate Document No. 248, 79th Congress, 2nd Session, p. 364. See also: Page 268 and Attorney General's Manual on the Administrative Procedure Act, pp. 71-72.)

56 Yale Law Journal 701 states:

> "The committee reports indicate that the exemption should be strictly construed, and in particular that statutory provisions authorizing the use of employees or attorneys generally should not be considered authorization for exemption. However, some statutory boards listed by the Attorney General in the Senate Report as examples of the exempted class seem to fall within the group which the reports indicate is not exempted. The apparent conflict can only be resolved on the grounds that the statutes setting up these boards did not authorize the use of employees generally but rather specified that their members should be selected from among eligible employees designated as such by the agency head."

The article concludes that the Immigration Service is required to comply with Section 11 (5 U. S. C. 1010) and appoint independent examiners.

The qualifications of immigrant inspectors are set forth in Announcement No. 4-71-1 (1949) of the Board of U. S. Civil Service Examiners. They are not required to have any educational background but merely investigatory or interviewing experience. In this connection the provisions of 8 C.F.R. 60.27 should also be noted.

> "60.27. *Authority of patrol inspectors, special inspectors, naturalization examiners, and other officers to act as immigrant inspectors.* All persons serving under appointment heretofore or hereafter made as patrol inspectors, special inspectors, naturalization examiners, or other officers of the Immigration and Naturalization Service of a higher grade than patrol inspector, special inspector, or naturalization examiner are hereby designated immigrant inspectors without additional compensation. The work as immigrant inspectors shall be arranged by supervisory officers so as not to interfere substantially with the performance of the duties of the other positions."

The duties of patrol inspectors are described in announcement No. 101 of the United States Civil Service Commission, issued June 1, 1948. This announcement describes their work as follows:

> "Patrol Inspectors will be members of the Immigration Border Patrol, a mobile uniformed enforcement organization; incumbents will be required to perform patrol duties on foot, by motor vehicle, by airplane, or on horseback. They will receive physical training equivalent to that given to commando units of the Armed Forces."

Although patrol inspectors are required to pass an aptitude test, there is no educational requirement for the posi-

tion. It will therefore be observed that patrol inspectors, naturalization examiners and all employees other than clerks and stenographers may be utilized by the Immigration Service to conduct hearings.

The Attorney General's Manual on the Administrative Procedure Act (1947) at p. 72 acknowledges:

> "A statutory provision which merely provides for the conduct of hearings by any officers or employees the agency may designate, does not come within the exceptions so as to authorize the agency to dispense with hearing examiners appointed in accordance with section 11. H. R. Rep. p. 34 (Sen. Doc. p. 268)."

In testimony before the Senate Subcommittee on Immigration on S. 2755 (June 9, 1948), Ashley Sellers representing the American Bar Association pointed out that the exemption of Section 7 contemplated the appointment of a special type of responsible official rather than employees generally (pp. 93 *et seq*).

Under its regulations the Immigration Service may designate border patrol men as immigrant inspectors to conduct hearings. They may select officials outside the government to so act as they did in the *Bridges* case. Any person, in or out of the government, may be designated an immigrant inspector to sit on a Board of Special Inquiry. 8 C. F. R. 60.29(c). Immigrant inspectors need not be lawyers, need not be trained in the law or in immigration matters in order to be designated as a hearing officer. If hearings conducted by immigration inspectors fall within the exemption of 5 U. S. C. 1006, then a loophole has been provided for the examiner system.

Finally, attention should be called to the contention below by the government and the view adopted by the *Azzollini* case that the Section 7 exemption completely frees the Immigration Service from all provisions of the Administrative Procedure Act and in particular from Section 5 (5 U. S. C.

1004). This is directly contrary to the view expressed by the Attorney General in his manual *supra* at p. 72 wherein it is stated:

> "Generally, whoever presides at the hearing (whether an examiner appointed pursuant to section 11, a member of the agency or a special statutory board of hearing officer) is subject to the remaining provisions of the Act. Sen. Rep. p. 21; H. R. Rep. p. 34 (Sen. Doc. pp. 207, 268)."

The Senate Judiciary Committee print of June 1945 explained Section 7(a) of the Administrative Procedure Act as follows:

> "This subsection contains merely formal provisions with reference to hearing officers. The problem of their selection is presented in section 11 and the comments thereon." [Senate Document 248, *supra*, at p. 29.]

In the Senate Committee Report of 1945, p. 21 (S. Doc. 248, 79th Cong., p. 207) it is stated:

> "Whoever presides is subject to the remaining provisions of the bill."

And again in House Committee Report, 1946, pp. 34-35 (S. Doc. 248, 79th Cong., pp. 268-269) it is repeated with reference to all presiding officers set forth in Section 7(a):

> "Those who so preside are subject to the remaining provisions of the bill."

If it were intended to exempt the specially designated officers mentioned in 7(a) from all the provisions of the Administrative Procedure Act, the exemption would have been set forth in Section 2 (5 U. S. C. 1003) where general exemptions are provided.

Section 7(a) provides that nothing in the Act shall supersede the *conduct* of proceedings before officers designated

by statute. The *conduct* of deportation proceedings is not provided by statute. There is therefore nothing in the Immigration statutes to be superseded. The requirements of the Administrative Procedure Act do not supersede the type of hearing officers designated by statute. Section 7a merely relates to hearing officers and cannot grant the Immigration Service a blanket exemption from the remaining provisions of the Act—an exemption which they have been seeking by legislative amendment.

If is therefore submitted that if the Section 7 exemption applies to deportation, the Immigration Service would be freed of the requirements of Section 11 (independent hearing officers) but not from Section 5 (separation of functions).

Conclusion

Deportation is a drastic measure and at times the equivalent of banishment or exile. *Fong Haw Tan* v. *Phelan*, 68 Sup. Ct. 374 (1948). Is it too much to expect that in such proceedings the quasi-judicial hearing officer be independent and divorced from investigatory and prosecution functions?

The decision in this case will not only affect aliens like plaintiff who entered comparatively recently but also those who have been here for almost all their lives.

The purpose of the Administrative Procedure Act was to bring fair hearing procedure into the administrative process. The requirements of separation of functions and independent hearing examiners were reforms advocated for some time in the exclusion and deportation of aliens.

Van Vleck, The Administrative Control of Aliens (1932), pp. 247, 46, 67;

The Secretary of Labor's Committee on Administrative Procedure, supra;

5 *National Commission on Law Observance and Enforcement* (1931);

Wasserman, The Challenge of Our Immigration Laws, Journal of Legal and Political Sociology (Fall 1944) p. 115.

Clark, Deportation of Aliens (1931).

This case raises for the first time in this court, the applicability of the Administrative Procedure Act to deportation. It is submitted that the Act applies to that process and that this petition for review be granted and a writ of certiorari issued.

Respectfully submitted,

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